FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 7 1946
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1946

No. 88.

HELENE A. JESIONOWSKI, ADMINISTRATRIX,
Petitioner,

v.

BOSTON AND MAINE RAILROAD,
Respondent.

BRIEF FOR THE RESPONDENT.

FRANCIS P. GARLAND,
Attorney for Respondent.

Of Counsel:
HURLBURT, JONES, HALL & BICKFORD.

ADDISON C. MITCHELL & SON, LAW PRINTERS, BOSTON.

Subject Index.

	Page
Opinion below	1
Jurisdiction	1
Statement of the case	2
Statement of facts	4
Question presented	9
Summary of the argument	9
Argument	11
The Circuit Court of Appeals was not in error in ruling that the doctrine of res ipsa loquitur is not applicable to the facts of this case	11
Conclusion	60

Table of Authorities Cited.

Cases.

Alexander v. Cosden Pipe Line Co., 290 U.S. 484	37
Arabia v. John Hancock Mut. Life Ins. Co., 301 Mass. 397	19, 43
Asprodites v. Standard Fruit & S.S. Co., 108 Fed. (2) 728	16
Atchison, T. & S.F. Ry. Co. v. Toops, 281 U.S. 351	12
Bagnell v. Boston Elevated Ry., 247 Mass. 235	49
Baltimore & Ohio R. Co. v. Berry, 286 U.S. 272	12, 49
Boice-Perrine Co. v. Kelley, 243 Mass. 327	52
Bonner v. Texas Co., 89 Fed. (2) 291	16, 18, 41, 43
Boston Food Products Co. v. Wilson & Co., 245 Mass. 550	35, 39
Brown v. Boston & Maine R.R., 302 Mass. 90	49
Byerly v. Light & Power Co., 130 Mo. App. 593	48
Cantley v. M., K., T. R.R. Co., 353 Mo. 605	46, 47
Chicago, M. & St. P. Ry. v. Coogan, 271 U.S. 472	12
Clark v. Detroit & M. R. Co., 197 Mich. 489	50

	Page
Cochrane v. Pittsburgh & L.E. R. Co., 31 Fed. (2) 769	56, 57
Commonwealth v. Welansky, 316 Mass. 383	35
Conn. Mutual Life Ins. Co. v. Hillmon, 188 U.S. 208	55, 56
Courtney v. N.Y., N.H. & H. R.R., 213 Fed. 388	16, 20, 23
Curtin v. Boston Elevated Ry., 194 Mass. 260	15, 29
Davis v. Aetna Acceptance Co., 293 U.S. 328	36
Davis v. Castile, 257 S.W. 870	41
Doughnut Machine Co. v. Bibbey, 65 Fed. (2) 635	47
Dryden v. Western Pacific R. Co., 1 Cal. App. (2) 49	17
Dunbar v. Ferrera Bros. Inc., 306 Mass. 90	19, 34, 43
Francey v. Rutland R.R. Co., 222 N.Y. 432	20, 23
Gilchrist v. Boston Elevated Ry., 272 Mass. 346	14
Ginzler v. Birmingham, 6 Ala. App. 666	55
Gray v. Baltimore & Ohio R. Co., 24 Fed. (2) 671	16, 18
Henson v. Lehigh Valley R.R. Co., 194 N.Y. 205	17, 32
James v. Boston Elevated Ry., 201 Mass. 263	38
Kay v. Metropolitan St. Ry. Co., 163 N.Y. 447	14
Keogh v. South Buffalo Ry. Co., 233 N.Y. 31	32, 37
Kid v. Coahuila Lead & Zinc Co., 204 S.W. 284	20, 24
Klingman v. Loew's Inc., 296 N.W. 528	20, 24
Leet v. Union Pacific R. Co., 144 P. (2) 64	57
Lennon v. Rawitzer, 57 Conn. 583	17, 18
Lockwood, Admr., v. Chicago &c. Ry. Co., 55 Wis. 50	32
Lonergan v. American Ry. Ex. Co., 250 Mass. 30	16
Looney v. Metropolitan R. Co., 200 U.S. 480	12, 50, 51, 53, 59
Lynch v. N.Y., N.H. & H. R.R., 294 Mass. 152	12, 13, 15, 16, 20, 32
Massa v. Nippon Yusen Kaisha, 264 N.Y. 283	17, 18, 20, 23
McCabe v. Boston Consol. Gas Co., 314 Mass. 493	12
McDonough v. Vozzela, 247 Mass. 552	52
McNamara v. Boston & Maine R.R., 202 Mass. 491	57

Page
Mikolajczyk v. Allcutt, 102 Fed. (2) 82 50
Minihan v. Boston Elevated Ry., 197 Mass. 367 13, 38
Minneapolis & St. Louis R.R. Co. v. Gotschall, 244 U.S. 66 15
Morley Constr. Co. v. Maryland Casualty Co., 300 U.S. 185 37
Mucha v. Northeastern Crushed Stone Co., Inc., 307 Mass. 592 28
New York Central R. Co. v. Ambrose, 280 U.S. 486 20, 28, 29
Oklahoma City v. McMaster, 196 U.S. 529 35, 39
Osgood v. Los Angeles Traction Co., 137 Cal. 280 47
Palum v. Lehigh Valley R. Co., 65 F. Supp. 1010 48
Papageorge v. Boston & Maine R.R., 317 Mass. 235 34, 35, 36
Patton v. Texas & Pacific Ry. Co., 179 U.S. 658 12, 14, 15, 20, 29, 30
Payne v. Boucher, 270 Fed. 38 12, 28, 29
Peirson v. Boston Elevated Ry., 191 Mass. 223 55, 56
Pekin Wood Products Co. v. Burkhardt, 192 Ark. 1025 17
Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333 12, 28, 49
Peterson v. Boston & Maine R.R., 310 Mass. 45 34
Pittsley v. Allen, 297 Mass. 83 16
Plumb v. Richmond, L. & R.R. Co., 233 N.Y. 285 15
Prondecka v. Turners Falls Power & Elec. Co., 238 Mass. 239 19, 43
Reading Co. v. Boyer, 6 Fed. (2) 185 12
Reardon v. Boston Elevated Ry., 247 Mass. 124 17
Robertson v. Chicago &c. Ry. Co., 177 Minn. 303 12, 29, 30, 32
Rogers v. Packing Co., 180 Mo. App. 227 48
Romana v. Boston Elevated Ry., 226 Mass. 532 34, 35, 36, 39

Page

San Juan Light & Transit Co. v. Requena, 224 U.S. 89.. 12, 13, 16, 17, 40, 47, 53, 60
Santa Maria v. Trotto, 297 Mass. 442 19, 43
S. E. Rand Transportation Co. v. Boston & Maine R.R., 273 Mass. 327 19, 34, 43
Showalter v. Western Pacific R. Co., 16 Cal. (2) 460 29
Southern Ry. Co. v. Stewart, 115 Fed. (2) 317 50
St. Louis &c. Ry. v. Mills, 271 U.S. 344 12, 49
Sweeney v. Erving, 228 U.S. 233 12, 13, 14, 48
Sweeting v. Penn. R. Co., 142 Fed. (2) 611 44, 45, 50
Tanona v. N.Y., N.H. & H. R.R., 301 Mass. 589 52
Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29 50, 51
Terminal R. Assn. of St. Louis v. Staengel, 122 Fed. (2) 271 32, 33
Texas & Pacific Ry. Co. v. Barrett, 166 U.S. 617 15
Texas & Pacific Coal Co. v. Kowsikowski, 103 Tex. 173 17, 20, 21, 28, 29, 32, 41, 42, 49, 53
Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54 11
United States v. Porter Bros. & Biffle, 95 Fed. (2) 694 15, 16, 17, 28
United States v. Ten Cases, More or Less, Bred Spred, 49 Fed. (2) 87 37
Van Horn v. Pacific Refining & Roofing Co., 27 Cal. App. 105 47
Warner v. Railroad, 178 Mo. 125 48

STATUTES.

Federal Employers' Liability Act, 45 U.S.C. c. 2, sec. 51 seq. 1, 2, 9, 11
Judicial Code, sec. 240 (a), as amended by Act of Feb. 13, 1925, 28 U.S.C. sec. 347 1
28 U.S.C. sec. 225 1

Rules of Civil Procedure, Rule 75(d) 39

TEXTBOOKS.

	Page
38 Am. Jur., sec. 308, p. 1005	40
Prosser on Torts (1941 Ed.) p. 295	46
1 Shearman & Redfield, Negligence (Rev. Ed.) sec. 56	13, 14, 15, 28

Supreme Court of the United States.

October Term, 1946.

No. 88.

HELENE A. JESIONOWSKI, Administratrix,
Petitioner,
v.
BOSTON AND MAINE RAILROAD,
Respondent.

BRIEF FOR THE RESPONDENT.

Opinion Below.

The opinion of the Circuit Court of Appeals for the First Circuit, dated April 1, 1946, which appears in the record at pages 119-123, is reported in 154 Fed. (2) 703.

Jurisdiction.

The District Court of the United States had jurisdiction of the cause of action under the Federal Employers' Liability Act, U.S.C. Title 45, c. 2, §§ 51 *seq.*, the Circuit Court of Appeals had appellate jurisdiction to review by appeal the final decision of the District Court under U.S.C. Title 28, § 225; and this court has jurisdiction under U.S.C. Title 28, § 347 (Judicial Code, § 240 (a), as amended by the Act of February 13, 1925).

Statement of the Case.

This is an action of tort brought under the provisions of an Act of Congress approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases" (U.S.C. Title 45, §§ 51 *seq.*), as amended, for the death of an employee of the defendant, the plaintiff's intestate, on July 1, 1944, while he was engaged in a switching operation in the defendant's freight yards near Lynn, Massachusetts (R. pp. 1-3, 4-5).

Hereinafter the petitioner, Helene A. Jesionowski, Administratrix, will be referred to as the plaintiff, and the respondent, Boston and Maine Railroad, will be referred to as the defendant.

The writ was filed October 18, 1944 (R. p. 1).

The complaint (R. pp. 1-3, 4-5) contains two counts. The first count alleges in substance that on July 1, 1944, while the plaintiff's decedent was employed as a brakeman on a train of the defendant at Lynn, Massachusetts, it became his duty to take part in a switching operation, which required him to ride upon a freight car which was one of a string of freight cars which was being pushed in upon a siding by a locomotive of the defendant; that by reason of a defect or insufficiency, due to the negligence of the defendant, in its car, track, or roadbed, the car upon which the plaintiff's decedent was riding was derailed, and as a result of the derailment the decedent was thrown from the car upon which he was riding under its wheels and instantly killed. The second count, added by amendment (R. pp. 4-5), alleges in substance that the decedent's death resulted from the derailment of the car upon which he was riding, and that the derailment resulted from negligence of the defendant, without specifying any particular negligence.

The defendant's answer appears at pages 3-4, 5-6 of the record.

The case was tried before Ford, J., and a jury on May 1 and 2, 1945 (R. p. 6), in the District Court of the United States for the District of Massachusetts.

At the close of the evidence the defendant duly and seasonably filed a motion for a directed verdict on each count (R. pp. 6-8). This motion was allowed on the first count and denied on the second count (R. pp. 6, 97), and the defendant's exception was saved (R. p. 97).

The defendant duly and seasonably requested the court to give certain instructions to the jury (R. p. 113), among which are the following:

> "6. The doctrine of *res ipsa loquitur* is not applicable to the facts of this case.
>
> "7. The plaintiff's intestate had control of the switch at the time of the accident.
>
> . . . . . .
>
> "14. There is no evidence which would warrant a finding that the derailment was due to negligence of the defendant."

These instructions the court refused to give, and to this refusal the defendant duly excepted (R. p. 109).

On the first count of the complaint the jury returned a verdict for the defendant by direction of the court (R. pp. 6, 9, 97-98), and judgment for the defendant was entered on this count (R. p. 9). On the second count of the complaint the jury returned a verdict for the plaintiff in the sum of $20,000 (R. p. 9), and judgment was entered for

the plaintiff on the second count in this sum with costs (R. p. 9).

From the judgment for the plaintiff on the second count the defendant claimed an appeal to the Circuit Court of Appeals for the First Circuit (R. pp. 9, 114), and on April 1, 1946, the Circuit Court of Appeals for the First Circuit reversed the judgment of the District Court, and ordered judgment to be entered for the defendant (R. p. 123).

The plaintiff's petition for certiorari was granted May 20, 1946.

Statement of Facts.

The only eye-witness to the accident was Harrison I. Whitney, who was called as a witness by the plaintiff (R. p. 10). At the trial Whitney testified that he was a locomotive engineer employed by the Boston and Maine Railroad; that he recalled that there was an accident about 5.30 in the morning on July 1, 1944, which was a clear day; that after he went by West Lynn he brought the train, with forty-nine cars, to a stop (R. p. 10); that Jesionowski was the brakeman, and he went back to cut off four cars; that he had been riding with the witness in the cab of the engine up to that point; that after a time he (the witness) got the go-ahead motion by lantern and started along (R. p. 11); that he continued to go ahead towards the Saugus River until he got from Jesionowski a lantern signal to stop (R. pp. 11-12, 22); that when he stopped in response to that lantern signal the front of his locomotive was at a switch point or cross-over near the Saugus River, marked "A" on a plan (R. p. 22) introduced in evidence and marked "Exhibit 1" (R. pp. 49, 111); that he then saw Jesionowski go towards the switch stand (R. pp. 12, 23);

that the switch stand was at a point on the plan marked "B"; that when Jesionowski came from that point back toward the car he (the witness) got a signal to back, and he started backing (R. pp. 12, 23); that he next saw Jesionowski *on the side of one of the freight cars*—the evidence does not show which car, or on which end of the car—and he (Jesionowski) gave a second signal to back (R. pp. 13, 23); that he (the witness) had already started backing by the time he got the second signal from Jesionowski; that in making his movements forward, in stopping, and in backing, he relied on the signals which he got from Jesionowski (R. p. 23); that he had backed about three car lengths when he saw splinters going in the air (R. pp. 13, 23); that he then stopped the locomotive within 15 or 20 feet (R. p. 15), and went across the cab to look out on the fireman's side and saw that the cars were in a U-shape; that he immediately went back on the north side to see what had taken place and found *one end of the car was on the main line and the other on the north siding*, so there was a derailment of that fourth car from the engine (R. pp. 15, 25-26); that he examined the switch (R. p. 16), and observed that the switch was set for the north siding (R. p. 17), and with reference to the switch stand he observed that the handle was down and the lock was in place but not locked; that that was the customary thing because the brakeman (Jesionowski) was going to let him out and then throw the switch again later (R. pp. 17-18); that on the day before he had used the same switch and it worked properly, and on the next day he operated a train over it and it worked properly then (R. p. 20). The witness further testified (R. p. 22) that the length of the locomotive was about 80 feet; that these freight cars were about 40 feet, with a space between the cars for coupling purposes about 18 inches (R. p. 22); that the total length of the train was about 246 feet (R. p. 31); that when he finally

stopped after the derailment, the front of the locomotive was near the switch stand, which is marked "B" on the plan (Exhibit 1, R. p. 111) (R. p. 24); that he was backing the train about 5 miles an hour (R. pp. 14, 26).

Earl M. Harvey, called by the defendant (R. p. 33), testified (R. p. 33) that he was a civil engineer for the Boston and Maine Railroad; that the plan (Exhibit 1, R. p. 111) was made by him, based upon measurements and a survey which he personally made (R. p. 34); that the frog to the left or towards Lynn from the switch point marked "B" is 75½ feet from the point marked "B" (R. p. 36); that the switch point, operated by means of the switching device (R. p. 39), was 15 feet long (R. pp. 37, 38, 40); that the rear car of the string of four cars was 44 feet 9 inches from the end of one knuckle to the other knuckle (R. pp. 43, 44), and the shortest distance between the wheels, on car No. 72643 (the car which was derailed), from truck to truck, was 25 feet 9 inches (R. p. 42); that the distance between the cross-over marked "A" on the plan (Exhibit 1, R. p 111) and the switch point marked "B" on the plan is 224 feet, and that was based on his measurements (R. p. 35).

John F. Sweeney, the defendant's trainmaster (R. p. 62), testified (R. p. 62) that on the morning of the accident in which Mr. Jesionowski was involved he went to the scene of the accident, and arrived there about 6.20; that he found the rear truck of the leading car, as it was backed, was on the west-bound main track; *that the leading truck was not derailed* (R. p. 63); that the trucks of that car nearest the engine were derailed (R. p. 63); that he noticed some flange marks on the ties, *which commenced 6 or 8 feet west of the frog* (R. p. 66); that he had examined a couple of hundred derailments, and he had never known of one

being caused by a spring frog (R. p. 69); that he operated the switch both ways, and found that it operated perfectly; that he observed the condition of the roadbed and track and it seemed all right (R. p. 67).

Francis T. Flynn, the defendant's assistant division engineer (R. p. 72), testified (R. p. 73) that when he got there on the morning of the accident he saw that the lead trucks of the first car towards Lynn were on the westbound tracks and the rear trucks of that car were on the inside of the north rail of the north siding, and the first trucks of the next car were also derailed inside the south rail of the north siding (R. p. 73); that as a result of seeing these cars there he went to the switch stand, indicated on the plan near "B" (Exhibit 1, R. p. 111); that it was a hand switch; that he took the switch stand and threw the lever to open up the line to see whether the switch points fitted close to the stock rail and he found that in both cases they did (R. p. 75); that the switch points were 15 feet long (R. p. 75); that he found the tip of the switch point was close against the main-line track; that he then tried it on the side track and threw the switch back to its original position and it fitted again; that he found when he threw the switch back and forth that it worked all right (R. p. 75); that he could not find any derailment marks on the main line, so he went down on the side track and found wheel marks on the top of the rail at a distance of 69 feet from the switch point marked "B," going towards Lynn, on the switch-point side of the frog; that he traced those marks and found they continued 170 feet from the first mark 69 feet from the switch point (R. pp. 76-77), which would be about 6½ feet before you reached the frog going from the point of the switch (R. p. 83); that the two front bolts on the frog were damaged and the spring bolt was

dented (R. p. 83); that the wheels when they became derailed passed over and made marks where they passed over the bolt or spring and continued on to the marks beyond it; that the wheels of the car clipped the bolt heads (R. p. 85).

John F. Brady, a section foreman for the Boston and Maine Railroad (R. p. 91), testified (R. pp. 91-92) that he went to the scene of the accident on the morning it happened; that the first thing he did was to examine the switch; that he moved it himself and found the operation of the switch "was O.K."; that the points of the switch all fitted close to the stock rail; that no repairs to that switch had been made after the accident.

Leonard J. Casey, the defendant's track supervisor (R. p. 93), testified (R. p. 94) that he went to the scene of the accident on the morning the accident happened; that the first thing he did was to go to the switch stand and make a check on it; that he threw the switch back and forth and left it in its normal position; that he found the condition of the switch "was 100%, in very good shape" (R. p. 94); that he went to work and checked the roadbed and also the track; that 6 to 8 feet ahead of the point of the frog he found a mark on the rails and also some marks on the ties; that that mark continued right along the side track for quite a little distance (R. p. 94); that the only damage he found on the frog was right at the joint where it locks into the running rail; two of the plates were marked there; that there was a nick on the top of the nut, a flange mark, and the mark continued on and hit the spring of the frog, which is the bolt that goes through the frog, and bent that (R. p. 95).

Question Presented.

The plaintiff's specifications of errors (Plaintiff's Brief, pp. 5 and 6) raise one fundamental question:

WAS THE CIRCUIT COURT OF APPEALS IN ERROR IN RULING THAT THE DOCTRINE OF RES IPSA LOQUITUR IS NOT APPLICABLE TO THE FACTS OF THIS CASE?

Summary of the Argument.

THE CIRCUIT COURT OF APPEALS WAS NOT IN ERROR IN RULING THAT THE DOCTRINE OF RES IPSA LOQUITUR IS NOT APPLICABLE TO THE FACTS OF THIS CASE.

I. Under the Federal Employers' Liability Act liability arises from negligence, and that negligence must be the cause of the injury.

The burden of proving negligence is on the plaintiff.

II. Since there was no direct evidence of negligence, the plaintiff invokes the doctrine of *res ipsa loquitur*.

1. This doctrine has been defined in a number of cases.

2. Application of the doctrine has often been considered by courts of last resort.

(*a*) Application to passenger cases.
(*b*) Application to employee cases.
(*c*) Limitation in application of the doctrine.

III. There are three reasons why the doctrine is not applicable to the case at bar.

1. The first reason is that, in a suit by an employee against an employer, the doctrine is never applicable unless the instrumentality or instrumentalities involved are, at

the time of the accident, under the *exclusive control* of the defendant.

In the case at bar the instrumentalities involved were not under the exclusive control of the defendant.

2. The second reason is that the doctrine does not apply in cases in which the accident *may have happened without fault on the part of the employer.*

(*a*) In the case at bar the plaintiff's uncontradicted evidence shows, not only that the accident *may have happened through no negligence of the defendant, but that it probably resulted from the decedent's own conduct.*

(*b*) The plaintiff's burden of proof has not been sustained, since the inference of negligence is not the only inference that can fairly and reasonably be drawn from the circumstances surrounding the derailment.

3. The third reason is that the jury's verdict for the defendant on the first count of the complaint renders the doctrine inapplicable under the second count.

(*a*) The second count alleges general negligence. But the court instructed the jury that the issues under the second count were whether there was negligent operation of the cars or negligence in allowing defects in its instrumentalities to exist. In the absence of objection or exception, this became the law of the case.

(*b*) Any issue under the second count as to negligence predicated on a defect in the carrier's instrumentalities is foreclosed by the jury's verdict for the defendant on the first count.

The jury's verdict for the defendant on the first count is equivalent to a special finding of fact against the plaintiff's contention that there were any defects in the car, track or roadbed, including the frog and the switch.

(*c*) If the direction of a verdict for the defendant be regarded as a ruling of law, the same result is reached as if the jury's verdict be treated as a finding of fact, since no objection was made or exception taken.

(*d*) The plaintiff cannot question the conclusiveness of the adverse finding under the first count of the complaint in the absence of a cross-appeal.

(*e*) The result is that the jury's verdict on the first count and the judge's instruction to the jury eliminated under the second count all ground of complaint except possible negligence in the *operation of the train*, which is *particular* negligence. And the doctrine of *res ipsa loquitur* can never be invoked to supply the place of evidence of *particular* negligence.

For each and all of the foregoing reasons it is submitted that the Circuit Court of Appeals was not in error in ruling that the doctrine of *res ipsa loquitur* is not applicable to the facts of this case.

IV. The plaintiff's arguments do not support her contention that the Circuit Court of Appeals was in error as specified.

Argument.

THE CIRCUIT COURT OF APPEALS WAS NOT IN ERROR IN RULING THAT THE DOCTRINE OF RES IPSA LOQUITUR IS NOT APPLICABLE TO THE FACTS OF THIS CASE.

I. Under the Federal Employers' Liability Act (U.S.C. Title 45, c. 2, § 51) liability arises from negligence, and that negligence must be the cause of the injury.

Tiller v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 67.

Atchison, T. & S.F. Ry. Co. v. *Toops*, 281 U.S. 351, 354-355.

Baltimore & Ohio R. Co. v. *Berry*, 286 U.S. 272, 276.

The burden of proving negligence is on the plaintiff.

Pennsylvania R. Co. v. *Chamberlain*, 288 U.S. 333, 343.

Baltimore & Ohio R. Co. v. *Berry*, 286 U.S. 272, 276.

St. Louis &c. Ry. v. *Mills*, 271 U.S. 344, 347.

Looney v. *Metropolitan R. Co.*, 200 U.S. 480, 487-488.

Chicago, M. & St. P. Ry. v. *Coogan*, 271 U.S. 472, 478.

Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663.

Reading Co. v. *Boyer*, 6 Fed. (2) 185, 186.

Payne v. *Boucher*, 270 Fed. 38, 40.

Lynch v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152, 161.

Robertson v. *Chicago &c. Ry. Co.*, 177 Minn. 303, 306.

II. Since there was no direct evidence of negligence, the plaintiff invokes the doctrine of *res ipsa loquitur*.

1. This doctrine has been defined in a number of cases.

Sweeney v. *Erving*, 228 U.S. 233, 240.

San Juan Light & Transit Co. v. *Requena*, 224 U.S. 89, 98-99.

McCabe v. *Boston Consol. Gas Co.*, 314 Mass. 493, 496.

Lynch v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152.
Minihan v. *Boston Elevated Ry.*, 197 Mass. 367.
1 Shearman & Redfield, Negligence (Rev. Ed.) pp. 150, 152, § 56.

In *Sweeney* v. *Erving*, 228 U.S. 233, the court said at page 240:

> "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur, where it applies,* does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff." (Italics ours.)

In *San Juan Light & Transit Co.* v. *Requena*, 224 U.S. 89, 98-99, the court said:

> ". . . when a thing which causes injury, without fault of the injured person, is shown to be under the *exclusive control of the defendant*, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of explanation, that the injury arose from the defendant's want of care." (Italics ours.)

The rule deducible from all the cases is well stated in 1 Shearman & Redfield, Negligence (Rev. Ed.) p. 152, § 56:

> "Circumstantial evidence is insufficient . . . where the circumstances are consistent with freedom from wrong. The doctrine of res ipsa loquitur, which is 'a common-sense appraisal of the probative value of circumstantial evidence', requires evidence which shows at least the *probability* that a particular accident could not have occurred without legal wrong by the defendant. *The inference of negligence must be the only one* that can fairly and reasonably be drawn from the attendant circumstances." (Italics ours.)

2. Application of the doctrine has often been considered by courts of last resort.

(*a*) There is no difficulty in applying the doctrine in the case of a passenger injured by reason of a derailment. This is so both because of the high degree of care owed to a passenger and because of the fact that the passenger has no control of the instrumentalities causing his injury.

Kay v. *Metropolitan St. Ry. Co.*, 163 N.Y. 447, 453 (cited with approval in *Sweeney* v. *Erving*, 228 U.S. 233, 240-241).

Gilchrist v. *Boston Elevated Ry.*, 272 Mass. 346.

See *Patton* v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, and cases cited at page 663.

1 Shearman & Redfield, Negligence (Rev. Ed.) p. 152.

(*b*) There is a difference, however, in the application of the doctrine in employee cases.

Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663.

Texas & Pacific Ry. Co. v. *Barrett*, 166 U.S. 617.
Minneapolis & St. Louis R.R. Co. v. *Gotschall*, 244 U.S. 66, 67.
Lynch v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152, 162.
Curtin v. *Boston Elevated Ry.*, 194 Mass. 260, 264.

In *Patton* v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, the court said at page 663:

". . . while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely, . . . *a different rule obtains as to an employé.* The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence." (Italics ours.)

(*c*) The doctrine of *res ipsa loquitur* is a doctrine of limited application.

United States v. *Porter Bros. & Biffle*, 95 Fed. (2) 694, 698.
Plumb v. *Richmond, L. & R.R. Co.*, 233 N.Y. 285, 288.
1 Shearman & Redfield, § 56, p. 150.

In *United States* v. *Porter Bros. & Biffle*, 95 Fed. (2) 694, the court said at page 698:

"The doctrine of res ipsa loquitur is *restricted in its application* to cases where the defendant had *ex-*

clusive control of the thing which caused the injury, the party injured was without fault, and the injury was such as in the ordinary course of things would not have occurred if the one having such control had used proper care. In the absence of an explanation in such cases, the court may presume that the injury arose from the defendant's want of care, but *the presumption does not reasonably follow unless all other conclusions are fairly excluded.*" (Italics ours.)

III. There are three reasons why the doctrine of *res ipsa loquitur* is not applicable to the case at bar.

1. The first reason is that, in a suit by an employee against an employer, the doctrine is never applicable *unless the instrumentality or instrumentalities involved are, at the time of the accident, under the exclusive control, direction, management, or operation of the defendant.*

San Juan Light & Transit Co. v. *Requena*, 224 U.S. 89, 98-99.

United States v. *Porter Bros. & Biffle*, 95 Fed. (2) 694, 698.

Bonner v. *Texas Co.*, 89 Fed. (2) 291, 294.

Gray v. *Baltimore & Ohio R. Co.*, 24 Fed. (2) 671.

Asprodites v. *Standard Fruit & S.S. Co.*, 108 Fed. (2) 728, 729.

Courtney v. *N.Y., N.H. & H. R.R.*, 213 Fed. 388, 390.

Lynch v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152, 162.

Pittsley v. *Allen*, 297 Mass. 83, 85.

Lonergan v. *American Ry. Ex. Co.*, 250 Mass. 30, 36.

Reardon v. *Boston Elevated Ry.*, 247 Mass. 124, and cases collected.

Massa v. *Nippon Yusen Kaisha*, 264 N.Y. 283, 284-285.

Henson v. *Lehigh Valley R.R. Co.*, 194 N.Y. 205.

Lennon v. *Rawitzer*, 57 Conn. 583, 587.

Texas & Pacific Coal Co. v. *Kowsikowsiki*, 103 Tex. 173, 174-175.

Dryden v. *Western Pacific R. Co.*, 1 Cal. App. (2) 49.

Pekin Wood Products Co. v. *Burkhardt*, 192 Ark. 1025.

In *San Juan Light & Transit Co.* v. *Requena*, 224 U.S. 89, the court said at pages 98-99:

> "... when a thing which causes injury, without fault of the injured person, is shown to be under the *exclusive control of the defendant*, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." (Italics ours.)

In *United States* v. *Porter Bros. & Biffle*, 95 Fed. (2) 694, the court said at page 698:

> "The doctrine of res ipsa loquitur is restricted in its application to cases where *the defendant had exclusive control* of the thing which caused the injury, the party injured was without fault, and the injury was such as in the ordinary course of things would not have occurred if the one having such *control* had used

proper care. In the absence of an explanation in such cases, the court may presume that the injury arose from the defendant's want of care, but the presumption does not reasonably follow unless all other conclusions are fairly excluded." (Italics ours.)

In *Bonner* v. *Texas Co.*, 89 Fed. (2) 291, the court said at page 294:

"Res ipsa loquitur does not help, for that doctrine applies only when the instrumentalities causing injury are shown to have been *wholly in the care of defendant*, and not to have been meddled with by the person injured or outsiders." (Italics ours.)

In *Gray* v. *Baltimore & Ohio R. Co.*, 24 Fed. (2) 671, the court said at page 673:

"The switch was taken under the *control of the negro* at the time he sawed the lock, and from that time until the wreck *it cannot be said that it was solely under the control of the defendant.*" (Italics ours.)

In *Massa* v. *Nippon Yusen Kaisha*, 264 N.Y. 283, the court said at pages 284-285:

"*The first item of proof necessary to bring this rule into action is that the thing is shown to be under the management of the defendant.*" (Italics ours.)

In *Lennon* v. *Rawitzer*, 57 Conn. 583, the court said at page 587:

". . . there are several conditions which are essential to lay the foundation for any presumption. One is that the thing must be *under the management of the*

defendant or his servants. Here the actual management at the time was controlled by the plaintiff, which would at least require caution in applying the rule, lest the plaintiff's own carelessness be visited on the defendants." (Italics ours.)

In the case at bar the evidence shows that the switch involved was a hand switch (R. pp. 16-17, 39, 75), operated by the decedent (R. pp. 12, 23), and there is no evidence that anyone touched the switch after the decedent had thrown it for the switching movement of the train onto the side track. The plaintiff's only witness to the accident, Whitney, the locomotive engineer, testified (R. p. 17) that after the accident he examined the switch and observed that the switch was set for the north siding, and with reference to the switch stand he observed that the handle was down and the lock was in place but not locked; that that was the customary thing because the brakeman (Jesionowski) was going to let him out and then throw the switch again later (R. pp. 17-18). Accordingly the judge of the District Court instructed the jury (R. p. 104): *"Now there is no question that the deceased had control of the switch for the purpose of directing the movement of the cars . . ."*

Since there was no objection or exception, this became the law of the case.

S. E. Rand Transportation Co. v. *Boston & Maine R.R.*, 273 Mass. 327, 329, 332.
Dunbar v. *Ferrera Bros. Inc.*, 306 Mass. 90, 91.
Prondecka v. *Turners Falls Power & Elec. Co.*, 238 Mass. 239, 241.
Arabia v. *John Hancock Mut. Life Ins. Co.*, 301 Mass. 397, 401.
Santa Maria v. *Trotto*, 297 Mass. 442, 446-447.

On the facts just stated, the doctrine of *res ipsa loquitur* is not applicable to this case, and the Circuit Court of Appeals was correct in the following statement (R. p. 123):

> "Thus an essential element of the principle of *res ipsa loquitur* is that the defendant have exclusive control of the thing causing the injury. Such essential element is not clear in this case."

2. The second reason is that the doctrine does not apply in cases in which the accident *may have happened without fault on the part of the employer.*

New York Central R. Co. v. *Ambrose,* 280 U.S. 486, 490.

Patton v. *Texas & Pacific Ry. Co.,* 179 U.S. 658, 663-664.

Texas & Pacific Coal Co. v. *Kowsikowsiki,* 103 Tex. 173, 174-175.

Courtney v. *N.Y., N.H. & H. R.R.,* 213 Fed. 388, 390 (cited with approval in *Lynch* v. *N.Y., N.H. & H. R.R.,* 294 Mass. 152, 163).

Massa v. *Nippon Yusen Kaisha,* 264 N.Y. 283, 284-285.

Francey v. *Rutland R.R. Co.,* 222 N.Y. 482, 485-486.

Klingman v. *Loew's Inc.,* 296 N.W. 528, 531.

Kid v. *Coahuila Lead & Zinc Co.,* 204 S.W. 284, 286, 287, and cases cited.

In *New York Central R. Co.* v. *Ambrose,* 280 U.S. 486, the court said at page 490:

> "The utmost that can be said is, that *the accident may have resulted from any one of several causes,* for some of which the company was responsible, and for some of which it was not. This is not enough. See

Patton v. *Texas & Pacific R. Co.*, 179 U. S. 658, where, at page 663, this court said: 'The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. . . . *it is not sufficient for the employé to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was.* And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs.'" (Italics ours.)

In *Texas & Pacific Coal Co.* v. *Kowsikowsiki*, 103 Tex. 173 (*a case directly in point*), the court said at pages 174-175:

"'Where the particular thing causing the injury has been shown to be under the management of the defendant, or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care.'

"This would probably be an eminently just conclusion if the assumption upon which it is founded were just, viz., that the evidence shows that the particular thing which caused the death in question was under the exclusive management and control of the defendant. The derailment of the car, unexplained, is a fact which by its very nature may be admitted to suggest something amiss, a want of proper precaution somewhere. *But what was the cause of the derailment?* Until we can answer that question, we think it must be admitted that it is not shown by the evidence that the particular thing which caused this injury was in the exclusive management of the defendant. If everything that could reasonably be assigned as the cause of the derailment had been wholly under the control of servants of defendant *other than the deceased himself*, it might be inferred that the cause, whatever it was, consisted in some negligent act or omission of theirs. *But we have a track, with its switches, and a motor car, defects in, or negligent management of, any of which might have brought about that which happened. The deceased himself had a hand in the management of the switches, and also in controlling the movements of the car, in so far as it depended on the giving of signals.* Negligence is not to be imputed either to him or to the defendant's other servants without proof; and a state of facts in which the cause of the accident cannot be found does not warrant a conclusion that one, rather than the other, produced it. *We cannot presume in favor of one against the other. Evidence must be brought by a plaintiff, having the burden of proof, sufficient to justify an inference of negligence on the part of the defendant, and none such can be drawn from an occurrence which, while indicating negligence some-*

where, is as consistent with the hypothesis that it was his own, or that of one in whose right he sues, as it was that of the other party." (Italics ours.)

In *Courtney* v. *N.Y., N.H. & H. R.R.*, 213 Fed. 388, the court said at page 390:

"The maxim res ipsa loquitur does not apply where the accident *might have been due to improper handling* as well as to improper furnishing the thing causing the accident." (Italics ours.)

In *Massa* v. *Nippon Yusen Kaisha*, 264 N.Y. 283, the court said at page 285:

"There is no presumption that the defendant was lacking in proper care in furnishing proper appliances when *the accident might have happened* through the carelessness of some member of the *stevedore's gang.*" (Italics ours.)

In *Francey* v. *Rutland R.R. Co.*, 222 N.Y. 482, the court said at pages 485-486:

"The mere happening of the accident did not necessarily exclude the inference that it might have been caused by the negligence of the plaintiff, or without any negligence at all. It was, therefore, necessary for the plaintiff to supplement the proof of the accident with evidence tending to show that it resulted from the failure of the defendant to exercise ordinary care, either in the selection of the engine or in keeping it in reasonably safe repair.

"In the present case the proof at the conclusion of the evidence was such that *the jury might have found*

the accident was due to either one of two causes—negligence on the part of defendant in failing to keep the locomotive in repair, or to the negligence of the plaintiff in letting cold water into the boiler in the condition in which it was at the time the explosion took place. Before the plaintiff could recover, therefore, the burden was upon him to prove that the accident was due *solely* to the first cause. If it were just as probable that the explosion was due to one cause as the other, then he necessarily must fail in the action." (Italics ours.)

In *Klingman* v. *Loew's Inc.*, 296 N.W. 528 (Minn.), the court said at page 531:

"The circumstances must *exclude* any reasonable probability that the fault of the one seeking to invoke it (the doctrine of *res ipsa loquitur*) contributed to the result of which he complains."

In *Kid* v. *Coahuila Lead & Zinc Co.*, 204 S.W. 284 (Mo.), the court said:

"Where the evidence is circumstantial only and reveals a state of facts from which the inference could as reasonably be drawn that the accident was due to a cause or causes other than [illegible]e tainted with the defendant's negligence, then the plaintiff cannot recover. *Wilkerson* v. *Railroad Co.*, 140 Mo. App. 306, 320.

"In *Byerly* v. *Light & Power Co.*, 130 Mo. App. 593, the court said: 'Where the evidence shows the injury *may have been caused* by the negligent act, but in its aspect most favorable to the plaintiff is just as consistent with the inference that *the injury might have been produced by another cause*, to send the case to the jury would be to accord them the right to make an

arbitrary choice between two equally probable, but unproved conclusions, and thus the verdict, if for the plaintiff, would be based not entirely on evidence, but in part on mere speculation and conjecture. This would mean a reversal of the rule imposing the burden of proof on the plaintiff, since the defendant, in order to prevent the jury from making him the victim of conjecture would be forced to assume the burden of showing that his negligence did not produce the injury.'

"*Where there are two or more possible causes for an accident,* each shown by circumstantial evidence only, and the one might just as reasonably and certainly be inferred from the evidence as the other, then the jury cannot be allowed to attribute it to the one tainted with negligence rather than the other, for to do so is mere speculation. This is merely an application of the oft-repeated rule stated in *Warner* v. *Railroad,* 178 Mo. 125, 133, that: 'If the injury *may have resulted from one of two causes,* for one of which and not the other, the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result, and if the evidence leaves it to conjecture, the plaintiff must fail in his action.' "

And at page 287:

"The rule which we applied is also stated in *Rogers* v. *Packing Co.,* 180 Mo. App. 227, 236, as follows: 'In a case where the injury *might have resulted from one of several causes,* for one of which the defendant is liable and for the others he is not liable, it is incumbent upon the plaintiff to prove his case by showing that the injury arose from that cause for which the defendant is liable.' "

(*a*) In the case at bar the plaintiff's uncontradicted evidence shows, not only that the accident *may have happened through no negligence of the defendant, but that it probably resulted from the decedent's own conduct.* The plaintiff's witness Whitney, the locomotive engineer (R. p. 10), the only eye-witness to the accident, testified (R. pp. 11, 22) that Jesionowski, the brakeman, had been riding with him in the cab of the engine, and he went back to cut off four cars so he then had four freight cars and a locomotive which were to go forward toward the Saugus River (R. p. 22); that after Jesionowski had cut the four cars off he (the witness) received a lantern signal to go ahead (R. pp. 11, 22), and he continued to go ahead towards the Saugus River until he got from Jesionowski a signal to stop; that when he stopped in response to that lantern signal the front of his locomotive was at a switch point or cross-over near the Saugus River at the point marked "A" on the plan (Exhibit 1, R. p. 111) (R. p. 22). The witness Whitney further testified (R. p. 22) that the length of the locomotive was about 80 feet and those freight cars were about 40 feet, with a space between the cars for coupling purposes about 18 inches (R. p. 22); that the total length of the train was about 246 feet (R. p. 31); that when he finally came to a stop, after the derailment, the front of the locomotive was near the switch stand, which is marked "B" on the plan (Exhibit 1, R. p. 111) (R. p. 24); that he got off the locomotive and went back and found one end of the car was on the main line and the other end was on the north siding, so there was a derailment of that fourth car from the engine (R. pp. 15, 25-26); that he examined the switch (R. p. 16) and observed that the switch was set for the north siding (R. p. 17), and with reference to the switch stand he observed that the handle was down and the lock was in place but not locked; that that was the customary thing *because the*

brakeman (Jesionowski) *was going to let him out and then throw the switch again later* (R. pp. 17-18); that in making the movements forward, in stopping, and in backing he relied on the signals he got from Jesionowski (R. p. 23). There was evidence that the distance between the cross-over marked "A" on the plan (Exhibit 1, R. p. 111) and the switch stand marked "B" on the plan was 224 feet (R. p. 35). Mathematical calculation shows that with the front of the locomotive stopped at point "A" in response to Jesionowski's signals, with the over-all length of the engine and four cars about 246 feet (R. p. 31), the rear of the last car would be 22 feet beyond the switch toward Lynn, that is, short of the switch. The switch point was 15 feet long (R. pp. 37, 38); on the freight car which was derailed the distance between the two sets of trucks was 25 feet 9 inches (R. p. 42); and the length of this freight car was 44 feet 9 inches (R. p. 43). There was sufficient space underneath this last car for the switch point to operate easily, and the probability is that while the car was in this position, with the wheels still on the main track straddling the switch point, Jesionowski threw the hand switch and then gave the motion to back. The result of this operation would be that the lead trucks would back along the main track—*and it is significant that these lead trucks were not derailed* (R. p. 15, Q. 94; p. 26, X-Q. 223; p. 50, Q. 12; p. 63, Q. 17-18; p. 73, Q. 24)—while the other trucks and the cars following would back along the north siding. In this way the rear trucks of the lead car would become derailed; and this is precisely what the evidence shows happened, since the marks of derailment commenced on the switch-point side of the frog (R. p. 77), 6 to 8 feet *ahead of the frog* (R. pp. 66, 94), or 69 feet beyond the switch toward Lynn and continued for 170 feet beyond (R. pp. 76-77).

Thus the plaintiff's evidence shows, not only that the derailment *may have happened without negligence on the part of the defendant, but that it probably resulted from the conduct of the decedent, who operated the switch and controlled the situation.* The decedent signaled the engineer where to stop before he threw the hand switch, and after throwing the switch he gave the engineer the motion to back (R. pp. 12-13, 22-23).

This explanation, based upon the physical facts and simple mathematical calculations, affords a reasonable explanation of the derailment and rebuts any inference of negligence on the part of the defendant, since under the doctrine of *res ipsa loquitur "the inference of negligence must be the only one that can fairly and reasonably be drawn from the attendant circumstances."*

1 Shearman & Redfield, Negligence (Rev. Ed.) p. 152.

United States v. *Porter Bros. & Biffle*, 95 Fed. (2) 694, 698.

(*b*) Since, therefore, the inference of negligence of the defendant is not the only inference that can fairly and reasonably be drawn from the circumstances surrounding the derailment, the plaintiff has failed to sustain her burden of proof.

Texas & Pacific Coal Co. v. *Kowsikowsiki*, 103 Tex. 173, 175.

Payne v. Boucher 270 Fed. 38, 40.

New York Central R. Co. v. *Ambrose*, 280 U.S. 486, 489-490.

Pennsylvania R. Co. v. *Chamberlain*, 288 U.S. 333.

Mucha v. *Northeastern Crushed Stone Co., Inc.*, 307 Mass. 592, 597.

Curtin v. *Boston Elevated Ry.*, 194 Mass. 260, 264.

Robertson v. *Chicago &c. Ry. Co.*, 177 Minn. 303, 306.

Showalter v. *Western Pacific R. Co.*, 16 Cal. (2) 460.

Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663.

In *Texas & Pacific Coal Co.* v. *Kowsikowsiki*, 103 Tex. 173 (*a case directly in point*), the court said at pages 174-175:

> "We cannot presume in favor of one against the other. Evidence must be brought by a plaintiff, having the burden of proof, sufficient to justify an inference of negligence on the part of the defendant, and none such can be drawn from an occurrence which, while indicating negligence somewhere, is as consistent with the hypothesis that it was his own, or that of one in whose right he sues, as it was that of the other party."

In *Payne* v. *Boucher*, 270 Fed. 38 the court said at page 40:

> "Negligence of the employer is an affirmative fact to be established by the one speaking for the deceased employee. . . . Evidence that the employer *may have been guilty of negligence* is not sufficient."

In *New York Central R. Co.* v. *Ambrose*, 280 U.S. 486, the court said at pages 489-490:

> "In any view of the matter, the respondent (plaintiff) upon whom lay the burden, completely failed to prove that the accident was proximately due to the

negligence of the company. It follows that the verdict rests only upon speculation and conjecture, and can not be allowed to stand. . . .

"*The utmost that can be said is, that the accident may have resulted from any one of several causes, for some of which the company was responsible, and for some of which it was not. This is not enough.* See *Patton* v. *Texas & Pacific R. Co.*, 179 U.S. 658, . . . 663." (Italics ours.)

In *Robertson* v. *Chicago &c. Ry. Co.*, 177 Minn. 303, the court said at page 306:

"Verdicts cannot rest on conjecture. The burden was on plaintiff to show that the accident resulted from defects in the car. It is not enough to show that there may have been defects. The evidence must go further and justify an inference that the accident resulted from the cause alleged rather than from some other cause. *If it is equally probable that the accident resulted from some cause other than the negligence of the defendant, there can be no recovery.* To warrant a recovery the evidence must furnish a reasonable basis for a finding that the accident is more likely to have resulted from the negligence alleged than from other causes." (Italics ours.)

In *Patton* v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, the court said at pages 663-664:

"The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. *Texas & Pacific Railway* v. *Barrett*, 166 U. S. 617. Second. That in the latter case it is not sufficient for the em-

ployé to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In this connection the Circuit Court of Appeals in its opinion said (R. p. 122):

"The 'thing' which caused the injury in our case was within the confines of a compound of several elements, including the stopping of the train to begin the switching, the giving of the signals, the throwing of the switch, the backing of the train, the condition of the track and track bed, the switch mechanism, the car wheel flanges and other rolling stock equipment. In this compound of elements the railroad corporation was not in exclusive control. Jesionowski was in control of important elements. In a very practical sense he, and not the corporation, was in control of very important elements, for he alone was in a position to observe; and it was his duty to observe and require the train to pull forward far enough for all of the

wheels of the fourth car to clear the switch points before signaling the engineer to stop the forward movement, and the same duty continued after throwing the switch and before giving the signal to back.

"The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault. *It was the jury's duty to determine the cause of the accident, and since it must make that determination out of a set of facts wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of res ipsa loquitur.*"

This statement of the Circuit Court of Appeals is based upon the decisions of this court and other courts of last resort. A case directly in point on the facts is *Texas & Pacific Coal Co.* v. *Kowsikowsiki,* 103 Tex. 173, 174-175, which is cited with quotations on pages 21-23 of this brief.

Accordingly it is well settled that the mere derailment of a car is not evidence of negligence which would warrant recovery by an injured employee.

Texas & Pacific Coal Co. v. *Kowsikowsiki,* 103 Tex. 173, 174-175.

Henson v. *Lehigh Valley R.R. Co.,* 194 N.Y. 205.

Keogh v. *South Buffalo Ry. Co.,* 233 N.Y. 31.

Lockwood, Admr., v. *Chicago &c. Ry. Co.,* 55 Wis. 50, 53.

Robertson v. *Chicago &c. Ry. Co.,* 177 Minn. 303, 306.

Lynch v. *N.Y., N.H. & H. R.R.,* 294 Mass. 152, 162.

The case of *Terminal R. Assn. of St. Louis* v. *Staengel,* 122 Fed. (2) 271, is clearly distinguishable. In that case the

derailment was caused by an automatic switch, controlled from a switch tower by a servant of the defendant, and not, as in the case at bar, a hand switch operated by the intestate himself. Moreover, in the *Staengel* case all the cars of the freight train had safely passed the switch except the rear wheels of the last car, when concededly the switch jumped. From these facts it could be inferred either that the switchman in the tower threw the lever too soon or that there was some defect in the automatic switch which caused the derailment. From either of these causes negligence of the defendant could be inferred.

In this connection the court said at page 275:

> "In short, this evidence showed an abnormal action of the switch, which action defendant's evidence showed could not have happened with normal functioning and which defendant could not account for nor offer any explanation.
>
> "Even if we take all this evidence as true, it is clear that there must have been some defect in these switch instrumentalities because it did shift to the 11th Street track within a very few seconds after the front trucks of the last car passed over it."

3. The third reason why *res ipsa loquitur* is not applicable is that the jury's verdict for the defendant on the first count of the complaint (R. pp. 9, 98) renders the doctrine inapplicable under the second count.

(*a*) The second count of the complaint, added by amendment (R. pp. 4-5), alleges general negligence. Under this count the court instructed the jury (R. p. 106) that the issues were: "Was the defendant guilty of negligence in the *operation of the cars* or *in allowing a defect in its instrumentalities to exist* that was the cause of the deceased's death?"

Since no objection was made or exception taken to this instruction, it became the law of the case.

S. E. Rand Transportation Co. v. *Boston & Maine R.R.*, 273 Mass. 327, 329, 332.
Dunbar v. *Ferrera Bros. Inc.*, 306 Mass. 90, 91.

(*b*) Any issue under the second count as to negligence predicated on a defect in the carrier's instrumentalities is foreclosed by the jury's verdict for the defendant on the first count, which alleges (R. p. 2) that "*by reason of a defect or insufficiency, due to the negligence of the defendant, in its car, track or roadbed, the car upon which the decedent was riding was derailed . . .*"

Papageorge v. *Boston & Maine R.R.*, 317 Mass. 235, 239.
Peterson v. *Boston & Maine R.R.*, 310 Mass. 45, 51.

In *Papageorge* v. *Boston & Maine R.R.*, 317 Mass. 235, the court said at page 239:

> "The verdict for the defendant upon the first count of the declaration which alleged a failure upon the part of the defendant to give the statutory signals required by G. L. (Ter. Ed.) c. 160, § 138, *is not consistent with any contention that can now be made that such signals were not given.*"

The case of *Romana* v. *Boston Elevated Ry.*, 226 Mass. 532, referred to in the opinion of the Circuit Court of Appeals (R. p. 121), is not in conflict with *Papageorge* v. *Boston & Maine R.R.*, 317 Mass. 235, or *Peterson* v. *Boston & Maine R.R.*, 310 Mass. 45, previously cited.

In the *Romana* case the court said at page 536:

> "1. The declaration contained two counts. The first count was for ordinary negligence; the second count was for 'wilful, wanton and reckless negligence of the defendant company, its agents or servants.' On the second day of the trial the presiding judge directed the jury to find a verdict for the defendant on the first count and to this the counsel for the plaintiff consented. The defendant then contended that the verdict in its favor upon the first count entitled it as matter of law to a verdict in its favor on the second count."

The court held that no question of *res judicata* was involved; and this ruling was correct, since there was no *judgment* involved, but merely a *verdict* of the jury on the first count.

> *Oklahoma City* v. *McMaster*, 196 U.S. 529, 533.
> *Boston Food Products Co.* v. *Wilson & Co.*, 245 Mass. 550, 558.

In the *Romana* case the jury's verdict for the defendant on the first count, which was for negligence, had no bearing whatever on the issue of wilful, wanton and reckless conduct under the second count, since the kind of tort alleged in the first count was entirely different from the kind of tort alleged in the second count.

In *Commonwealth* v. *Welansky*, 316 Mass. 383, the Supreme Judicial Court of Massachusetts—the same court that decided both the *Papageorge* and the *Romana* cases—cites the *Romana* case at page 400, and says:

> "In pleadings as well as in statutes the rule is that 'negligence and wilful and wanton conduct are so different in kind that words properly descriptive of the one commonly exclude the other.'"

The court further says at page 401:

> "If by wanton or reckless conduct bodily injury is caused to another, the person guilty of such conduct is guilty of assault and battery. . . . And since manslaughter is simply a battery that causes death, . . . if death results he is guilty of manslaughter."

It is clear, therefore, that in the *Romana* case the jury's verdict for the defendant on the first count for negligence could have no bearing whatever on the question of wilful conduct alleged in the second count.

In the case at bar there is no such distinction between the issues involved in the first and in the second counts. The first count alleges specific negligence, and the second count alleges general negligence, just as in the case of *Papageorge* v. *Boston & Maine R.R.*, 317 Mass. 235, which is controlling in the instant case, since the jury's verdict for the defendant on the first count is equivalent to a special finding of fact against the plaintiff's contention that there were defects in the car, track or roadbed, including the frog and the switch.

The same rule holds in cases of special findings of fact by the court.

> *Davis* v. *Aetna Acceptance Co.*, 293 U.S. 328, 332, and cases cited.

In the case just cited, the court said at page 332:

> "The special controls the general, just as upon the verdict of a jury."

(*c*) In the case at bar, if the direction of a verdict for the defendant on the first count be regarded as a ruling of

law, the same result is reached as if the jury's verdict be treated as a finding of fact, since no objection was made and no exception taken.

Keogh v. *South Buffalo Ry. Co.*, 233 N.Y. 31, 33.

In the case just cited the court said at page 33:

> "In his charge to the jury the trial judge without objection stated that if there was no defect or insufficiency in the cars of the defendant or in its tracks, roadbed or equipment there could be no recovery. By the use of the word 'equipment' he had reference to the details of the cars or of the tracks. Later he was asked to say and did say that there was no evidence in the case as to the condition of the cars from which the jury could find the defendant negligent. He thus eliminated any consideration of this source of complaint. There was left a possible defect in the track causing the accident."

(*d*) The plaintiff cannot question the conclusiveness of the adverse finding under the first count of the complaint in the absence of a cross-appeal.

Alexander v. *Cosden Pipe Line Co.*, 290 U.S. 484, 487.

Morley Constr. Co. v. *Maryland Casualty Co.*, 300 U.S. 185, 191.

United States v. *Ten Cases, More or Less, Bred Spred*, 49 Fed. (2) 87, 89.

(*e*) The result is that the jury's verdict on the first count (R. p. 9) and the judge's instruction to the jury (R. p. 106) eliminated under the second count all ground of complaint except possible *negligence in the operation of the*

train, which is *particular* negligence. And it is well settled that the doctrine of *res ipsa loquitur* can never be invoked to supply the place of evidence of *particular* negligence, even in passenger cases.

James v. *Boston Elevated Ry.*, 201 Mass. 263, 265.

Minihan v. *Boston Elevated Ry.*, 197 Mass. 367.

In *James* v. *Boston Elevated Ry.*, 201 Mass. 263, the court said at page 265:

> "If there are different kinds of negligence that might cause an accident, the fact that the accident happens from some unknown cause is not enough to show that it happened from some . . ." (Italics ours.)

In order to escape under the second count the effect of the jury's finding of fact against the plaintiff as to the specific negligence alleged in the first count, the plaintiff erroneously argues that the defendant is invoking the doctrine of *res judicata* (Plaintiff's Brief, pp. 2, 7, 32-33), and quotes in this connection from the opinion of the Circuit Court of Appeals the following (R. p. 121): "We refuse to consider the point made but as to its merits see *Romana* v. *Boston Elevated Ry.*, 226 Mass. 532, 536."

Neither the Circuit Court of Appeals nor the plaintiff is correct in stating that "the defendant . . . contends that the verdict in the first count is *res judicata* as to the second count" (R. p. 121). No such contention is now made or ever has been made by the defendant. In the first place, the defendant does not contend that the two counts are *identical* (Plaintiff's Brief, p. 32). What the defendant does contend is that the second count for general negligence, being broader than the first count, in-

cludes, in addition to other grounds of negligence, the specific grounds of negligence alleged in the first count. In the second place, the defendant does not contend that the doctrine of *res judicata* is applicable, since that doctrine does not rest upon *verdicts* or *findings of fact*, but upon *judgments*.

Oklahoma City v. *McMaster*, 196 U.S. 529, 533.
Romana v. *Boston Elevated Ry.*, 226 Mass. 532, 536.
Boston Food Products Co. v. *Wilson & Co.*, 243 Mass. 550, 558.

Accordingly the Circuit Court of Appeals, as well as the plaintiff, is in error in assuming that this was a point which under Rule 75(d) of the Rules of Civil Procedure should have been designated as a point to be relied on on appeal. Since the defendant is making no contention that the doctrine of *res judicata* is applicable, it was unnecessary to make any designation of this as a point to be relied on.

The defendant's argument that the jury's verdict for the defendant on the first count eliminated from consideration under the second count the particular charges of negligence alleged in the first count is merely an argument in support of the proposition that the doctrine of *res ipsa loquitur* is not applicable to the facts in this case; and that point is specifically designated as the sixth point to be relied upon in the Statement of Points to be Relied upon on Appeal (R. p. 116).

For each and all of the foregoing reasons it is respectfully submitted that the Circuit Court of Appeals was not in error in ruling (R. p. 122) that the doctrine of *res ipsa loquitur* is not applicable to the facts of this case.

IV. The plaintiff's arguments do not support her contention that the Circuit Court of Appeals was in error as specified (Plaintiff's Brief, pp. 5-6).

Point One: In discussing the first specification of error (Plaintiff's Brief, pp. 7-9, inclusive), the plaintiff contends that "the decision of the appellate court rests principally if not entirely upon the false concept that the 'thing' which caused the injury in the case at bar was *within the confines of a compound of elements,*" enumerating the elements. It is not the concept of the Circuit Court of Appeals which is false, but the concept of the plaintiff. And the confusion in this part of the plaintiff's argument arises from the fact that the discussion is based on semantics and not on legal principles.

The plaintiff argues (Plaintiff's Brief, pp. 8-9) that both by intrinsic analysis and by judicial decisions the word "*thing*" means "*inanimate objects*" and does not include *conduct* as an element. This is erroneous. The word "thing" as used in the doctrine of *res ipsa loquitur* does not mean inanimate objects as the plaintiff claims, but rather means "the occurrence" or "happening" of an accident. And the occurrence or happening of an accident may result from conduct, as well as from defective conditions of inanimate things.

In the case at bar, it was the *derailment* which was the "*thing*" causing the injury, and it was the *derailment* with its attendant circumstances that speaks for itself. See 38 Am. Jur. § 308, p. 1005. Some of the attendant circumstances include *conduct* of the decedent himself, such as "The stopping of the train to begin the switching, the giving of the signals, the throwing of the switch, the backing of the train" (R. p. 122) in response to his signals.

The case of *San Juan Light Co.* v. *Requena*, 224 U.S. 89, 98-99, does not support the reasoning of the plaintiff. In

that case, from which a quotation appears on page 8 of plaintiff's brief, reference is made to *conduct* in the words: "the defendant's want of care." Want of care is *conduct*—negligent conduct. Furthermore, the words "without fault of the injured person" refer to *conduct*.

The fact, if it be a fact, as stated by the plaintiff at page 9 of her brief, that nowhere does Wigmore in his article "refer to *conduct* as a part of the doctrine" gives no support at all to plaintiff's contention. Even if Wigmore does not use the word "*conduct*," he does speak of "negligence," which is careless *conduct*.

The Circuit Court of Appeals was therefore correct in stating that the cause of the injury was "within the confines of a compound of elements" (R. p. 122). The concept of the Circuit Court of Appeals is correct, and is supported by all the authorities. Directly in point is the case of *Texas & Pacific Coal Co.* v. *Kowsikowsiki*, 103 Tex. 173, quoted at pages 21-23 of this brief, and cited with approval in—

Bonner v. *Texas Co.*, 89 Fed. (2) 291, 294.
Davis v. *Castile*, 257 S.W. 870 (Tex.).

In *Bonner* v. *Texas Co.*, 89 Fed. (2) 291, the court said at page 294:

> "*Res ipsa loquitur* does not help, for that doctrine applies only when the instrumentalities causing injury are shown to have been wholly in the care of defendant, and *not to have been meddled with by the person injured or outsiders.*" (Italics ours.)

In this connection it should be noted that in the latter part of her brief the plaintiff seems to have abandoned the theory that the word "thing" means "instrumentality" or "inanimate objects" and does not include conduct, for on page 30 there appears the statement "The *derailment* in

the case at bar ought to be sufficient, of itself, to raise a presumption in favor of the plaintiff or to permit an inference of negligence on the part of the defendant." *"Derailment"* is not a *"thing"* within the narrow meaning of that term assigned by the plaintiff; it is rather the *occurrence* or *happening* of the accident.

Points Two and Three: A second cause of confusion in the reasoning of the plaintiff results from an erroneous conception of the meaning of the term *"control"* as applied to instrumentalities. This is discussed under points two and three of the plaintiff's brief, pages 10-28. It is summarized on page 7, first paragraph, as follows:

> "Control, as that word is used in the doctrine, does not include the use or operation of the 'instrumentality' or 'thing' by an employee who is bound to use the 'things' provided for him by his master in the performance of his duties to the master."

No authority is cited by the plaintiff in support of this unsound contention. On the contrary, all the authorities hold that if the injured party had any part in *handling, managing,* or *operating* any instrumentality involved in the accident, he had sufficient control to prevent him from invoking the doctrine of *res ipsa loquitur.*

In this connection the court said in *Texas & Pacific Coal Co.* v. *Kowsikowsiki,* 103 Tex. 173, at page 174:

> "The deceased himself had a hand in the management of the switches, and also in controlling the movements of the car, in so far as it depended on the giving of signals."

Accordingly the court held that the doctrine of *res ipsa loquitur* was not applicable.

In the same connection, in the case of *Bonner* v. *Texas Co.*, 89 Fed. (2) 291, the Circuit Court of Appeals said at page 294:

> "Res ipsa loquitur does not help, for that doctrine applies only when the instrumentalities causing the injury are shown to have been wholly in the care of defendant, *and not to have been meddled with by the person injured or outsiders.*" (Italics ours.)

For further authorities see cases cited in this brief at pages 16-19.

The plaintiff's reasoning (Plaintiff's Brief, p. 11) is erreoneous in concluding that "Both counsel for the railroad and the appellate court treated the act of throwing the switch *at the wrong time* as a matter of control." This is not so. So far as *control* is concerned, the fact that the decedent threw the switch is conclusive that he *controlled* it, regardless of whether he threw it at the wrong time or not.

Not only does the undisputed evidence show that the decedent was in *control* of the hand switch involved in the switching operation, but the ruling of the District Court to that effect (R. p. 104), without objection or exception, establishes such control as the law of the case.

S. E. Rand Transportation Co. v. *Boston & Maine R.R.*, 273 Mass. 327, 329, 332.
Dunbar v. *Ferrera Bros. Inc.*, 306 Mass. 90, 91.
Prondecka v. *Turners Falls Power & Elec. Co.*, 238 Mass. 239, 241.
Arabia v. *John Hancock Mut. Life Ins. Co.*, 301 Mass. 397, 401.
Santa Maria v. *Trotto*, 297 Mass. 442, 446-447.

It follows that both on the facts and on the law of the case the Circuit Court of Appeals was not in error in making the following ruling (R. p. 122): "In this compound of elements the railroad corporation was not in *exclusive* control. Jesionowski was in control of important elements."

Moreover, it was not necessary for the defendant to request the trial court to rule on each and every detail of control, as contended by the plaintiff in her brief, at page 4. Some of these details have been characterized by the plaintiff in the following language (Plaintiff's Brief, p. 4): "These extraneous objects of control were *injected into the case* by the appellate court. In so doing the court clearly went outside of the instructions requested, denied, and excepted to." This argument is unsound, since these were all proper matters to be considered by the Circuit Court of Appeals in passing upon the error of the District Court both in denying the defendant's motion for a directed verdict on the second count and in denying the defendant's sixth request for instructions, which is as follows: "6. The doctrine of res ipsa loquitur is not applicable to the facts in this case."

There is nothing in the case of *Sweeting* v. *Penn. R. Co.*, 142 Fed. (2) 611, cited and discussed at pages 12-14 of plaintiff's brief, that supports the plaintiff's reasoning. In that case the court very properly held that, if the decedent was in the cab of the locomotive when he received the fatal electric shock, the doctrine of *res ipsa loquitur* would apply, since in that event the decedent would have had no *control* of the electric current which caused his death; but if the accident happened on the top or outside of the locomotive, then the doctrine would not apply, since in such case the accident *might have happened* as the result of the decedent's own conduct. The only question of fact

which the jury had to decide upon conflicting evidence was whether or not the decedent was inside the cab at the time he received the electric shock.

The plaintiff quotes from the *Sweeting* case on page 13 of her brief as follows:

> "Sweeting must be presumed to have been engaged in the performance of his duties and exercising due care for his own safety."

That is so in all cases in which there is no eye-witness to the conduct of a decedent. In the case at bar, however, there is undisputed evidence by the plaintiff's own witness Whitney as to the conduct of the decedent which may have caused the derailment.

On page 14 of her brief the plaintiff contends that the trial judge correctly charged the jury as to the application of the doctrine of *res ipsa loquitur*. The charge of the judge of the District Court as to this point is to be found in the record at pages 103-104. In its opinion (R. pp. 121-122) the Circuit Court of Appeals said:

> "It is the theory of appellant that since the operation of the switch, which was to direct the four cars from the main line onto the siding, was in the control of Jesionowski, and that since the instrumentality, which was involved in the damaging accident, was not under the exclusive control of appellant, the doctrine of *res ipsa loquitur* does not apply. Upon this question the trial court was most painstaking to explain that the jury should first consider whether or not the decedent was guilty of negligence, and that should they find him guiltless or at least guiltless as to any negligence contributing to the accident, the jury should then apply the doctrine of *res ipsa loquitur*. *This was error.*

The possible causal actions leading up to the fatal accident cannot be so separated. . . .

"The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault. It was the jury's duty to determine the cause of the accident, and since it must make that determination out of a set of facts wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of *res ipsa loquitur.*"

The quotation from Prosser on Torts (Plaintiff's Brief, p. 15) does not support the plaintiff's contention. In its opinion (R. pp. 122-123) the Circuit Court of Appeals quotes from Prosser on Torts, p. 295, and then says: "Thus an essential element of the principle of *res ipsa loquitur* is that the defendant have *exclusive* control of the thing causing the injury. Such essential element is not clear in this case."

It follows that the plaintiff has failed to sustain her burden of proof. See cases cited at pages 28-31 of this brief.

The quotations appearing in the plaintiff's brief at pages 15-17 are misleading. The distinction between "actual physical control" and the "right of control" is of no consequence in cases between employers and strangers, since in such cases physical or user control by the employee is legal control by the employer. But in cases between an an employee and his employer, *user control* or operation of the instrumentality is such control as will defeat the application of the doctrine of *res ipsa loquitur.*

Only one of the cases, *Cantley* v. *Missouri-Kansas-Texas R. Co.*, 353 Mo. 605, cited by the plaintiff at page 15, is an

employee case. In the *Cantley* case there was an issue of fact as to whether or not the speed of the engine at a curve caused the derailment, the plaintiff having had nothing to do with the *operation* of the engine.

In *Van Horn* v. *Pacific Refining & Roofing Co.*, 27 Cal. App. 105, 109, the plaintiff, who was not an employee of the defendant, was injured by reason of the explosion of a steampipe cap *which was in the exclusive control of the defendant.*

In *Doughnut Machine Corp.* v. *Bibbey*, 65 Fed. (2) 635, the lessee of a doughnut machine was injured by reason of a defective condition of the machine. The court did not permit the application of the doctrine of *res ipsa loquitur*, for the reason that there was direct evidence of a defective condition of the machine which caused the injury.

The case of *Osgood* v. *Los Angeles Traction Co.*, 137 Cal. 280, is a *passenger* case in which no such question of *control* could have been involved as is involved in the case at bar.

Both of the English cases cited (Petitioner's Brief, p. 17) involved innocent third parties and not employees who had a part in operating instrumentalities causing the injuries.

In this connection it must also be remembered that the case of *San Juan Light Co.* v. *Requena*, 224 U.S. 89, referred to on page 17 and elsewhere in plaintiff's brief, was a case in which the plaintiff was an innocent third party, and not an employee who had something to do with the operation of the instrumentality involved in the accident.

Quoting from the *San Juan* case the words "without fault of the injured person," the plaintiff proceeds to argue (p. 18) as follows: "It cannot be doubted that Jesionowski's alleged negligence was a question of fact for the jury which the defendant was bound to prove by a fair prepon-

derance of the evidence." This is erroneous. The only burden which the defendant had with regard to Jesionowski's negligence was the burden of proving contributory negligence, which is not now an issue. It follows that the cases cited by the plaintiff on page 18 are not in point, since they deal with contributory negligence.

Again, on page 28 of her brief the plaintiff says: "In the case at bar the defendant undertook to prove that the deceased's own act was the sole cause of his death. The burden was on the defendant to persuade the jury, by a fair preponderance of the evidence, that this was true." No such burden rested on the defendant.

It is true that the defendant's answer (R. pp. 5-6) contains the following: "And further answering the second count of the complaint, the defendant says that the plaintiff's intestate was guilty of negligence which was the sole proximate cause of his injuries and death." But this is a wholly unnecessary and immaterial allegation. It is only another way of saying that there was no negligence on the part of the defendant, which is properly raised by the general issue. *Palum* v. *Lehigh Valley R. Co.*, 65 F. Supp 1010. The defendant's general issue cannot thus be converted into an affirmative defense putting the burden of proof on the defendant.

Sweeney v. *Erving*, 228 U.S. 233, 240.
Byerly v. *Light & Power Co.*, 130 Mo. App. 593.
Warner v. *Railroad*, 178 Mo. 125, 133.
Rogers v. *Packing Co.*, 180 Mo. App. 227, 236.

The only issue before the court being negligence of the defendant, the burden is on the plaintiff to show such negligence. Accordingly the Circuit Court of Appeals ruled (R. p. 121) as follows: "By the answer the plaintiff was put upon her proof as to the defendant's alleged negli-

gence." This ruling was correct. The burden of proof is always on the employee to show negligence of the employer.

Pennsylvania R. Co. v. *Chamberlain,* 288 U.S. 333, 343.

Baltimore & Ohio R. Co. v. *Berry,* 286 U.S. 272, 276.

St. Louis &c. Ry. v. *Mills,* 271 U.S. 344, 347.

Texas & Pacific Coal Co. v. *Kowsikowsiki,* 103 Tex. 173, 175.

At the bottom of page 19 of her brief the plaintiff criticizes the following statement of the Circuit Court of Appeals (R. p. 122): "The thing that caused the injury could have been Jesionowski's fault," and says that this is not the true test. It is respectfully submitted that this is the true test as established by all the authorities. This point has been fully argued in this brief at pages 20-33.

The plaintiff, however, contends that "the test is whether or not the presumption of due care, and the evidence in the case, sufficed, as a matter of law, to make a jury issue." This argument is unsound for two reasons. In the first place, the presumption of due care on the part of a deceased employee is available only where there is no direct evidence as to what the decedent was doing at the time of the accident. In the case at bar the evidence (R. pp. 11-13, 22-23) shows what the decedent was doing.

Bagnell v. *Boston Elevated Ry.,* 247 Mass. 235, 238.

Brown v. *Boston & Maine R.R.,* 302 Mass. 90, 92.

In the second place, this presumption cannot be invoked to prove negligence of a defendant in a *res ipsa loquitur* case,

where, as in the case at bar, the inference of negligence of the defendant is not the only inference that may reasonably be drawn. The defendant's *negligence* cannot rest upon presumptions. It is a fact to be proved by the plaintiff.

> *Looney* v. *Metropolitan R. Co.*, 200 U.S. 480, 488.
> *Southern Ry. Co.* v. *Stewart*, 115 Fed. (2) 317, 322.
> *Mikolajczyk* v. *Allcutt*, 102 Fed. (2) 82, 84.
> *Clark* v. *Detroit & M. R. Co.*, 197 Mich. 489.

The rule enunciated in all the cases is well stated in *Looney* v. *Metropolitan R. Co.*, 200 U.S. 480, at page 488, as follows:

> "But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another."

None of the cases cited by the plaintiff on page 20 of her brief involves the doctrine of *res ipsa loquitur*, except the last case cited, *Sweeting* v. *Penn. R. Co.*, 142 Fed. (2) 611, 614, which has been distinguished by the defendant on pages 44-45 of this brief.

The case of *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, does not support the reasoning of the plaintiff. In the first place, in the cited case there was direct evidence of a violation of the railroad's own rule to ring a bell before starting a locomotive, and hence evidence of negligence; and in the second place, there was no evidence to show what the decedent was doing at the time of his death. Accordingly, it was properly held that he was pre-

sumed to have been engaged in the performance of his duties and that he exercised due care for his own safety at the time of his death. In its opinion in the *Tennant* case this court cites with approval the case of *Looney* v. *Metropolitan R. Co.*, 200 U.S. 480, 488; and that case is an authority directly against the petitioner's contention.

In the case at bar there was direct evidence as to the behavior of the decedent. This is conceded by the plaintiff on page 20 of her brief in the statement that Whitney was the only witness who testified as to the behavior of the deceased.

The plaintiff's statement on page 21 of her brief that the decedent mounted the stirrup *at the rear end* of the fourth car on the north or engineer's side, and there rode forward with the cut until he was opposite the switch, is unsupported by any evidence in the case. There is no evidence, direct or circumstantial, as to which stirrup or ladder the decedent used in getting on or getting off the car. He could properly have mounted the ladder on either end of the car and have been in the exercise of due care. Moreover, there is no evidence as to what car he got on after throwing the switch. It may have been the rear end of the third car, since his body was found under the third car after the derailment (R. p. 15).

The plaintiff argues that it would be irrational to say "that the fourth car stopped before it reached the switch points and that Jesionowski then, with the cars standing motionless, got off the *rear stirrup* and walked *diagonally forward* to the switch, passing the rear half of the fourth car." The defendant does not contend that the fourth car stopped before it reached the switch points; its contention is that the decedent stopped the train in such a way

that the fourth car straddled the switch points. Furthermore, there is no evidence that the decedent got off the fourth car by the *rear stirrup*. Moreover, the evidence quoted on page 21 of the petitioner's brief shows that the decedent walked "*at right angles*" from the car to the switch. And this evidence is just as consistent with the theory that he walked at right angles from the front of the car as with the theory that he walked at right angles after getting off the fourth car by the rear ladder. This evidence proves nothing as to the ladder he used. In the complete absence of evidence, no conjecture can be indulged as to whether he got on the third car or the fourth car, or if on the fourth car, whether he got on by the front ladder or by the rear ladder.

The alternative hypothesis or speculation set out by the plaintiff at the top of page 22 of her brief is without foundation in fact. There is no evidence whatever that the derailment occurred "*at the frog,* 75½ feet to the east of the switch points." The undisputed evidence (R. pp. 66, 77, 94) shows that the derailment occurred *before the frog was reached.* And if the jury disbelieved this evidence, that would not warrant a finding that the derailment happened because of the frog, since it is well-settled law that disbelief of testimony is not the equivalent of proof of facts contrary to that testimony.

Boice-Perrine Co. v. *Kelley,* 243 Mass. 327, 330.
McDonough v. *Vozzela,* 247 Mass. 552, 558.
Tanona v. *N.Y., N.H. & H. R.R.,* 301 Mass. 589, 592.

The plaintiff attempts to find support for this argument by again referring to the presumption of due care. As previously argued in this brief, the presumption of due

care of the decedent cannot be used as a basis for a presumption of negligence on the part of the defendant.

Looney v. *Metropolitan R. Co.*, 200 U.S. 480, 488.

It is unnecessary to discuss the plaintiff's argument in her brief, pages 22 to 28, that "the only evidence to support the defendant's plea that the deceased's death was solely caused by his own act consisted of testimony as to certain distances and the length of the engine and cut of four cars." The allegation in the defendant's answer (R. pp. 3-4) that the decedent's own negligence was the sole proximate cause of his injuries and death, as previously argued, was wholly unnecessary and immaterial. The burden is on the plaintiff to prove the defendant's negligence. There is no burden on the defendant to prove that the sole cause of the derailment was the conduct of the decedent. This point has been argued previously in this brief at pages 47-49.

Point Four: The plaintiff begins discussion of point four by referring again to the case of *San Juan Light Co.* v. *Requena*, 224 U.S. 89. It should be observed in connection with this case, as previously argued, that this was not a case involving an employee, but an innocent third party who had no part in the management, control or operation of the instrumentality involved. And while the definition of the doctrine is correctly given in that case, it is important to consider its application to employee cases where the injured employee had a part in handling the instrumentalities involved, as was done in the case of *Texas & Pacific Coal Co.* v. *Kowsikowsiki*, 103 Tex. 173, 174-175.

As to the first requirement stated in the definition given in the *San Juan* case, namely, that the plaintiff be without fault, the plaintiff again erroneously argues that "*the*

burden was on the respondent to persuade the jury, by a fair preponderance of the evidence," that the decedent's own act was the cause of his death. The fallacy of this argument has been discussed at length on pages 47-49 of this brief.

While it is true that there is a presumption of due care on the part of a deceased employee, in the absence of evidence as to what he was doing, there is an equal presumption of due care on the part of the employer. That is why an injured employee always has the burden of proving by affirmative evidence that the employer was negligent. What the plaintiff seeks to do in this case is to eliminate the requirement that the employee be without fault by invoking the presumption of due care on the part of the employee. The effect of such a theory would be to nullify completely the condition precedent that the injured employee must be without fault. In the case at bar, therefore, the Circuit Court of Appeals applied the proper test in its ruling (R. p. 122): "The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault. It was the jury's duty to determine the cause of the accident, and since it must make that determination out of a set of facts wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of *res ipsa loquitur.*" This question has been treated at greater length with citation of authorities earlier in this brief at pages 20-33.

As to the second and third requirements of the definition concerning *control,* nothing need be added to what has already been said at pages 16-20 of this brief.

On page 29 of plaintiff's brief reference is made to "instructions of the trial judge which were not excepted to." Reference is also made to this point on pages 2 and

5. On page 5 the plaintiff says: "So far as the *doctrine* is concerned, it is to be noted that neither party excepted to the judge's charge, which consequently became the law of the case." This argument is unsound. While it is true that no exception was taken to the charge, the defendant had saved its rights so that no exception to the charge was necessary. The defendant did take an exception (R. p. 97) to the trial court's denial of its motion for a directed verdict on the second count (R. pp. 7-8). The question of *res ipsa loquitur* is implicit in the first, second, third, fourth and sixth grounds in support of the motion, and especially in the fourth ground (R. p. 8): "4. The *evidence* does not warrant a finding that the derailment was due to any negligence of the defendant." Since the doctrine of *res ipsa loquitur* is merely a rule of *evidence*, the question of the applicability of the doctrine was sufficiently raised by the fourth and other grounds alleged in support of the motion for a directed verdict. Hence it is not true, as contended by the plaintiff on pages 3-4 of her brief, that not one of the grounds for the motion raises the issue of the applicability of the doctrine of *res ipsa loquitur*.

Moreover, the applicability of the doctrine was raised by the defendant's sixth request for instructions (R. p. 110), which is as follows: "6. The doctrine of *res ipsa loquitur* is not applicable to the facts in this case." The court denied this request, subject to the defendant's exception (R. pp. 109-110), and gave the jury instructions inconsistent with this request. No exception to the charge was necessary, since the defendant's rights were properly saved by its exception to the court's refusal to grant its request.

Conn. Mutual Life Ins. Co. v. *Hillmon*, 188 U.S. 208, 212-213.

Peirson v. *Boston Elevated Ry.*, 191 Mass. 223, 234.

Ginzler v. *Birmingham*, 6 Ala. App. 666.

In *Conn. Mutual Life Ins. Co.* v. *Hillmon*, 188 U.S. 208, the court said at page 213:

> "It is insisted in behalf of the plaintiff that, as no exception was taken to this part of the charge, its propriety cannot be questioned at this time; but as an exception was properly taken to the refusal of the court to charge . . . , we think there was sufficient to raise the point . . . Having excepted to the refusal to give a certain instruction, it was not necessary to repeat such exception when the contrary of such request was given in the general charge. As defendant had raised the point in one form, it was not necessary to raise it in another."

In *Peirson* v. *Boston Elevated Ry.*, 191 Mass. 223, the court said at page 234:

> "Nor is it any answer to the respondent's complaint to say that no exception was taken to the manner in which the charge to the jury dealt with this question. The evidence had been admitted subject to the respondent's exception. It had preserved its rights, and was not called upon to ask for any further ruling or to save any further exception upon this subject."

On page 30 of her brief the plaintiff cites the case of *Cochrane* v. *Pittsburgh & L.E.R. Co.*, 31 Fed. (2) 769, in an attempt to place an injured employee in as favorable position as an injured passenger, if not a more favorable position, and quotes from page 773 of that case:

> "The Federal Employers' Liability Act supplemented by the Safety Appliance Act has entirely changed the situation. Now an employee of an interstate carrier . . . is entitled to recover as broadly as an interstate passenger. The differences are very slight, and

such as do exist are probably in favor of the employee."

Even if there is any merit in that dictum, it has no application to the case at bar, since in the case at bar the injured employee had something to do with the operation of the instrumentalities involved in the derailment, and in the *Cochrane* case the court in its opinion stresses the importance in a derailment case of the absence of any control by the employee in the operation in which he is injured. In the *Cochrane* case the employee was injured as the result of an unexplained derailment which could not have been due to any conduct on his part, since the injured employee had no part whatsoever in the handling, direction, control, or operation of the train or other instrumentalities involved in the derailment, either by giving signals, throwing a switch or otherwise.

The other two cases cited on page 30 of the plaintiff's brief require little comment.

The case of *McNamara* v. *Boston & Maine R.R.*, 202 Mass. 491, merely holds that control by an employee is control by the employer *so far as innocent third parties are concerned*. It was not an employee of the defendant who was injured.

In *Leet* v. *Union Pacific R. Co.*, 144 P. (2) 64, the injured employees had no part whatever in the direction, control, operation, or handling of the instrumentalities involved in the derailment. Moreover, there was direct evidence of negligence on the part of the defendant *without the application of the doctrine*, and therefore the defendant was not prejudiced by instructions concerning the doctrine which the court gave.

At the bottom of page 30 the plaintiff argues: "If the derailment occurred *at the switch*, is it not remarkable that this happened despite the facts that the switch was thrown

in a proper manner and at the right time?" In the first place, there is no evidence that "the switch was thrown at the right time," and in the second place, there is no evidence that the derailment happened "at the switch." The evidence is that the derailment occurred at a point 69 feet *east of the switch* (R. pp. 76, 77, 83, 86), which clearly indicates that the derailment occurred as the result of the decedent's throwing the switch while the last car straddled the switch points. In this connection it should also be remembered that it was not the lead wheels of the backing car which were derailed, but the rear wheels (R. pp. 26, 50, 63-64, 76), and this fact constitutes further proof that the wheels, which would be the lead wheels in the backing movement, had not reached the switch. If, as the petitioner contends, the switch was properly thrown after all the wheels of the four cars had gone beyond the switch points, and if the decedent then set the switch for the movement onto the side track, as it was found to be set after the derailment (R. p. 17), and if, as the evidence shows (R. pp. 26, 50, 63-64, 76), the lead wheels went down the main track and were never derailed, the following wheels having gone down the side track and having become derailed, in that case the accident could not have happened unless the switch points, which could be operated only by hand (R. pp. 17, 66), first jumped to let the lead wheels go down the main track and then jumped back to let the following wheels go down the side track. Such a performance by a hand switch, without interference of any kind—of which there is no evidence—is impossible; and such a theory of the accident must be rejected.

The plaintiff next argues, at the bottom of page 30: "Or, if the derailment occurred at or near the frog, is it not remarkable that there were planks between the rails near the frog?" The fair interpretation of the evidence

in this respect (R. pp. 13, 18, 23, 26, 27, 28) is not that there were *planks* between the rails, but *splinters* of planks which *came up from under the cars* (R. p. 28) between the rails, which indicated to the engineer that there was a derailment and caused him to stop (R. p. 13). However that may be, the undisputed evidence shows that the derailment occurred at a point 6 to 8 feet west of the frog (R. pp. 66, 77, 83, 94), that is, before the wheels of the lead car, which went down the siding in response to the switching movement, had reached the frog. The fact that there were marks of wheel flanges on top of the rails (R. p. 77) 6 or 7 feet west of the frog (R. p. 66) indicates clearly that the wheels were derailed before the frog was reached. The testimony concerning the frog is immaterial for the reason that there is no evidence that the frog was involved in the derailment, since the undisputed evidence clearly shows that the derailment occurred before the frog was reached.

Finally it is said that there is no evidence to show that the front wheels of the fourth car took the main line at the switch. The answer is that there is no evidence to show that the lead wheels in the backing movement ever left the main track, for the reason that there is no evidence that those wheels ever reached the switch points.

The frustration of plaintiff's counsel, mentioned on page 32 of her brief, results from the failure of counsel to understand that the condition precedent to the applicability of the doctrine of *res ipsa loquitur*, namely, that the employee be without fault, is not fulfilled by invoking a presumption of due care on the part of the injured employee, since there is an equal presumption that the employer was in the exercise of due care, which leaves the scales on this point in equal balance.

Looney v. *Metropolitan R. Co.*, 200 U.S. 480, 488.

The plaintiff argues that the ruling of the Circuit Court of Appeals contravenes the doctrine as stated in the *Requena* case. On the contrary, the plaintiff's contention contravenes the doctrine for the reason that it is well settled in employee cases that the doctrine does not apply if the injury *might* have resulted from the conduct of the injured employee. This point has been argued fully in this brief at pages 20-33.

Point Five: The plaintiff's argument under Point Five, pages 32-33 of her brief, is unsound. The plaintiff seems to misunderstand the effect of the verdict for the defendant on the first count. The defendant does not contend that the two counts are identical. Notwithstanding the contention of the plaintiff and the statement of the Circuit Court of Appeals (R. p. 121), the doctrine of *res judicata* is not involved. This point has been fully discussed in this brief at pages 33-39.

Conclusion.

Upon the facts and upon well-settled principles of law it is respectfully submitted that the Circuit Court of Appeals was not in error in ruling that the doctrine of *res ipsa loquitur* is not applicable to the facts of this case.

Wherefore the respondent prays that the judgment of the Circuit Court of Appeals be affirmed.

FRANCIS P. GARLAND,
Attorney for the Respondent.

Of Counsel:
HURLBURT, JONES, HALL & BICKFORD.

SUPREME COURT OF THE UNITED STATES

No. 88.—October Term, 1946.

Helene A. Jesionowski, Administratrix, Petitioner, v. Boston & Maine Railroad.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[January 13, 1947.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner brought this action for damages in the Federal District Court under the Federal Employers Liability Act, 35 Stat. 65, 53 Stat. 1404, 45 U. S. C. § 51 *et seq*, for causing the death of her intestate. Count I alleged that "By reason of a defect or insufficiency, due to the negligence of the defendant, in its car, track, or roadbed, the car upon which the plaintiff decedent was riding was derailed . . .," causing the decedent to be thrown from the car and killed. Count II, without specifying any particular acts of negligence, charged generally that the derailment and decedent's death were the "result of the negligence of the defendant." After the evidence was in, the Court, at the request of the respondent, directed the jury to return a verdict for the respondent on the first count. Respondent's motion for directed verdict, on the second count on the ground that the evidence failed to justify a finding of negligence, and that it showed that deceased was killed as the sole result of his own negligence, was overruled. The jury rendered a verdict for petitioner and judgment was entered on it. The Circuit Court of Appeals reversed and remanded to the District Court with directions to render judgment for the respondent. 154 F. 2d 703.

The trial court charged the jury that the burden was upon petitioner to prove by a fair preponderance of the evidence that the deceased's death was caused by respondent's negligence. It invoked the trial rule under which

negligence may be inferred from unusual happenings growing out of conditions under a defendant's control. Referring to this rule under the name of *res ipsa loquitur*, the court charged: "Of course if the deceased's negligence was the sole cause of the accident the plaintiff here cannot recover. And since there can be no application of the doctrine of *res ipsa loquitur* if other causes than the negligence of the defendant, its agents or servants, might have produced the accident, the plaintiff is bound, she has the burden, to exclude the operation of such causes by a fair preponderance of the evidence before the rule can be applied. This is so because if there are other causes than the negligence of the defendant that might have caused the accident, the defendant cannot be said to be in exclusive control—one of the prerequisites to the application of the rule here invoked." The Circuit Court of Appeals reversed because it thought that the jury should not be permitted to draw an inference of defendant's negligence from an extraordinary accident growing out of a general set of circumstances which included activities of the injured person, even though a jury, under proper instructions, could find from the evidence that the injured person's activities did not cause the injury. The Circuit Court's limitation of the jury's province by this interpretation of a doctrine of *res ipsa loquitur* raised a question of importance in the trial of cases arising under federal law. We granted certiorari to consider this question. — U. S. —.

The testimony, so far as relevant, to point the issues may be briefly summarized. Four railroad cars were being pushed backward and eastward by an engine in order to put them on a siding north of the main track. It was the duty of deceased, a brakeman, to throw the switch before the first car reached it in order that the four cars would take the siding. There was evidence that he threw the switch and gave a signal to the engineer to back the cars.

Respondent's evidence was sufficient to authorize, but not to compel, the jury to find that the deceased negligently threw the switch while the lead car in the backward movement straddled the switch with one set of the car wheels on one side of the switch and one on the other. If true, this could mean that the wheels east of the switch would move down the main line and the others would enter the siding when the switch was thrown and the backward movement took place, thus probably causing derailment. If the jury had believed respondent's evidence that this last car was astride the switch when it was thrown, it would have been authorized, under the court's charge, to find for the respondent. But about 75 feet east of this switch, at a point where the south rail of the siding track intersected the north rail of the main track, there was a frog. There was testimony that this frog operated with a spring mechanism, and that if the spring failed to work when the wheels passed over it, the cars might be derailed. Some other evidence tended to show that, at the time the derailment occurred, splinters and planks were thrown into the air near the frog. Other evidence tended to show that planks and splinters were found on the track. Some testimony showed that they were close to the switch, and some that they were close to the frog. There was evidence that the frog and switch had been in good condition before the derailment and after the derailment. The cars had been operated and the tracks had been used previously, so far as the evidence showed, without any similar mishap.

In *San Juan Light Co.* v. *Requena*, 224 U. S. 89, 98–99, this Court said: "when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that

the injury arose from the defendant's want of care." Both prior to and after that case was decided, this Court has acted upon this rule in varying types of cases. *Transportation Co.* v. *Downer*, 11 Wall. 129; *Inland & Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, 555; *Gleeson* v. *Virginia M. R. R.*, 140 U. S. 435; *Sweeney* v. *Erving*, 228 U. S. 233, 240. See also *Southern Ry.* v. *Bennett*, 233 U. S. 80; *Foltis* v. *City of New York*, 287 N. Y. 108, and cases collected, 153 A. L. R. 1134. The Circuit Court of Appeals thought, however, that the rule was improperly applied in this case because the railroad instrumentalities here were not under the "exclusive control" of the railroad; that "The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault." 154 F. 2d 703, 705.

The Court's reasoning was this: Petitioner was not entitled to have her case submitted to the jury except under the rule of *res ipsa loquitur*. That rule has rigidly defined prerequisites, one of which is that to apply it, the defendant must have exclusive control of all the things used in an operation which might probably have caused injury. Here the railroad did not have exclusive control of all probable causative factors since deceased had some immediate control over switching and signaling. "Exclusive control" of all probable causative factors, the court reasoned, means that *res ipsa loquitur* cannot be applied even though those non-exclusively controlled factors are clearly shown to have had no causal connection with the accident.

We cannot agree. *Res ipsa loquitur*, thus applied, would bar juries from drawing an inference of negligence on account of unusual accidents in all operations where the injured person had himself participated in the operations, even though it was proved that his operations of the things under his control did not cause the accident. This viewpoint unduly restricts the power of juries to decide questions of fact, and in this case the jury's

right to draw inferences from evidence and the sufficiency of that evidence to support a verdict are federal questions. A conceptualistic interpretation of *res ipsa loquitur* has never been used by this Court to reduce the jury's power to draw inferences from facts. Such an interpretation unduly narrows the doctrine as this Court has applied it.

This Court said, in *Sweeney* v. *Erving*, 228 U. S. 233, 240, a decision which cut through the mass of verbiage built up around the doctrine of *res ipsa loquitur*, that "*res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict." Thus, the question here really is not whether the application of the rule relied on fits squarely into some judicial definition, rigidly construed, but whether the circumstances were such as to justify a finding that this derailment was a result of the defendant's negligence. We hold that they were.

Derailments are extraordinary, not usual, happenings. When they do occur, a jury may fairly find that they occurred as a result of negligence. It is true that the jury might have found here that this accident happened as a result of the negligence of the deceased; but although the respondent offered evidence to establish this fact, it "did not satisfy the jury." *Southern Ry.* v. *Bennett*, *supra* at 86. With the deceased freed from any negligent conduct in connection with the switch or the signaling, we have left an accident, ordinarily the result of negligence, which may be attributed only to the lack of care of the railroad, the only other agency involved. Once a jury, having been appropriately instructed, finds that the employee's activities did not cause the derailment, the de-

fendant remains as the exclusive controller of all the factors which may have caused the accident. It would run counter to common everyday experience to say that, after a finding by the jury that the throwing of the switch and the signaling did not contribute to the derailment, the jury was without authority to infer that either the negligent operation of the train or the negligent maintainance of the instrumentalities other than the switch was the cause of the derailment. It was uncontroverted that the railroad had exclusive control of both. We think that the facts support the jury's findings both that the deceased's conduct did not cause the accident and that the railroad's negligence did.

Respondent also urges here, as it did in the Circuit Court of Appeals, that because the trial judge directed a verdict for it on the first count of the complaint, which charged a defect in the car, track or roadbed, the court was not justified in submitting to the jury the question of a defect in these respects under the second count. The Circuit Court held that this question was not properly raised before it because respondent had failed on appeal to make "a concise statement" of the point as required by Rule 75 (d) of the Rules of Civil Procedure. Respondent argues that the question was properly raised, though not specifically, by its general point that "the doctrine of *res ipsa loquitur* is not applicable to the facts of this case." We cannot hold that the Circuit Court erred when it refused to consider the question because of respondent's failure to comply with Rule 75 (d).

Reversed.

MR. JUSTICE REED, MR. JUSTICE JACKSON and MR. JUSTICE BURTON would affirm on the grounds stated in the opinion of the Circuit Court of Appeals for the First Circuit.